August 2010 *Issue 4*

Employment Law Newsletter

INTRODUCTION

Welcome to Field Court Chambers Employment Law Newsletter.

The last few months have provided another swathe of interesting EAT and Court of Appeal decisions, the most informative of which are covered here. In this issue we cover important case law on the ambit of disability discrimination, including in respect of depression (***J v DLA Piper***) and perceived disabilities (***Aitken v Metropolitan Police***), as well as the extension of what may constitute a reasonable adjustment (***South Yorkshire Police v Jelic***).

We also look at the question of whether an action can be brought outside of the ET jurisdiction where an employer fails to comply with contractually specified disciplinary procedures (***Edwards v Chesterfield Royal Hospital***). We cover useful Court of Appeal guidance on the definition of 'contract worker' under discrimination legislation (***Leeds CC v Woodhouse*)** and guidance on the ***Burchell*** test where the effect of a misconduct dismissal will be more serious than the mere loss of a job (***Salford NHS Trust v Roldan***).

In June, we held a very successful seminar looking at the basics of unfair dismissal practice and procedure, and we hope you will put **5th October** into your diaries to attend our next employment law seminar. ***The Equality Act – changing the face of discrimination***. With the election over and the coalition government now settled in, we all wait with bated breath to see whether the Equality Act 2010 will be implemented in full, or whether the new government will take a pair of sharpened scissors to its most controversial elements. Chambers' Employment Law Group will be providing an essential insight into the impact of the Equality Act 2010 on 5th October, four days after the intended implementation date.

We hope you enjoy this newsletter and, as always, welcome your feedback.

Jason Braier
Employment Law Group

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EMPLOYMENT TEAM

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CASE UPDATES

Discrimination claims for depression may be easier after EAT ruling

J v DLA Piper UKEAT/0263/09/RN

J brought a claim under the Disability Discrimination Act 1995 when DLA Piper, a law firm, withdrew a job offer after she disclosed her history of depression. DLA Piper cited a recruitment freeze caused by the credit crunch as the reason for the withdrawal. J complained of disability-related and direct discrimination, arguing that, at the material time, she suffered from clinical depression, which met the definition of 'disability' under the Act. The ET struck out the DDA claim on the basis that J suffered from no sufficiently well-defined impairment, and that any impact of her condition on her ability to carry out day-to-day activities was no more than minor or trivial.

J appealed to the EAT on the basis that the ET had erred on the question of disability. J argued that DLA Piper had discriminated against her based on its perception that she was disabled, and that this should be covered by the DDA, construed in the light of the ECJ's interpretation of the Framework Directive in ***Coleman v Attridge Law*** C-303/06.

The EAT upheld J's appeal, holding that the tribunal had failed to take into account evidence from J's GP, preferring the more sceptical evidence of a specialist. The EAT commented on the correct approach for a tribunal to take when considering mental illness as a 'disability' under S.1 DDA.

There is no absolute need for the tribunal first to identify an 'impairment' and then go on to consider its effect on the claimant's abilities. However, the EAT did not agree that the impairment issue may simply be ignored. So, while it remains good practice for a tribunal to state its conclusions on the questions of impairment and adverse effect separately, it should not proceed by rigid consecutive stages.

The EAT cautioned against a formulaic approach to the issue of whether an 'impairment' has been proved, and recommended that tribunals have regard to the material distinction between 'clinical depression' and a reaction to adverse circumstances.

To content

Rhys Hadden

Costs awarded where unfair dismissal claim brought by Claimant committing fraud on Respondent

Nicolson Highlandwear Ltd v Gordon Nicolson (UKEATS/0058/09/BI)

This appeal concerned a claim for automatic unfair dismissal brought by a claimant dismissed for gross misconduct in circumstances where he had been found by the employer to have diverted the Respondent's work to his own personal company and to have, in effect, defrauded the employer. The employer had failed to adhere to the statutory disciplinary and dismissal procedure.

The Claimant was candid before the ET about his actions. The ET found him automatically unfairly dismissed but reduced his award to nil on the basis of his contribution to dismissal. An application was made by the Respondent for costs and the ET hearing the application refused it.

The EAT (Lady Smith, sitting alone) found the ET decision perverse. It reinforced that, unlike in discrimination claims, there is no declaratory relief available under the ERA. The claimant had brought a claim on the basis of procedural flaws in circumstances where he knew through his lying and fraudulent activity his dismissal was appropriate, even though he was not dismissed according to appropriate procedure.

To bring a claim in such circumstances amounted to unreasonable conduct in accordance with

paragraph 40(3) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, and accordingly an order for costs should have been made against the Claimant.

To content *Jason Braier*

Damages payable for breach of express contractual disciplinary provisions

Edwards v Chesterfield Royal Hospital NHS Foundation Trust [2010] EWCA Civ 571

Mr Edwards' employment contract contained express terms as to the disciplinary procedure applicable to matters of professional conduct. The Trust did not follow that procedure in several material respects. Mr Edwards brought proceedings in the High Court arguing that there would have been no finding of professional misconduct but for these breaches.

Initially, the Trust successfully argued that it was entitled to terminate the contract for whatever reason simply by giving notice so Mr Edwards was only entitled to recover loss of earnings during that contractual notice period. On appeal Nichols, J extended this to include the period during which Mr Edwards would have remained in employment while a compliant disciplinary procedure ran its course.

In the Court of Appeal, the Trust argued that the law precludes the recovery of substantial damages for the breach of a disciplinary procedure of this kind, leaving the employee to his remedy under Part X of the Employment Rights Act 1996.

However, after an extensive review of ***Johnson v Unisys Ltd*** [2001] UKHL 13 and other authorities, the Court held that the principle that the implied term of trust and confidence does not extend to the circumstances and manner of dismissal does not impinge on any cause of action the employee may otherwise have for breach of contract.

Whether the parties in fact intended the provisions relating to disciplinary matters to sound in damages depends on a true construction of the contract.

Accordingly, Mr Edwards is entitled to recover the sums claimed if he can show that the losses were caused by the Trust's failure to comply with the contractual disciplinary procedure and that those losses were not too remote to be recoverable in law.

To content *Christine Cooper*

No special exception to the 'without prejudice' rule for discrimination cases

Woodward v Santander (EAT) UKEAT /0250/09/ZT

In the 1990's there had been previous litigation between the parties. C had brought claims for unfair dismissal and sex discrimination. The claims were settled without admission of liability. The terms of settlement did not provide for a reference. It was C's case that this was because R had refused point blank during the settlement negotiations to provide one.

C subsequently brought further claims for sex discrimination, victimisation and under the whistle-blowing provisions where she alleged that R had frustrated her applications for alternative employment and had not dealt properly with her application for another position with R. As part of her case C wished to rely on the refusal to provide a reference during the earlier settlement negotiations. The case thus required the EAT to consider the scope of the rule of evidence excluding matters that were without prejudice and its exceptions. It held that the without prejudice rule applied as much to exclude matters in discrimination cases as it did in any other case.

The case of ***BNP v Mezzotero*** had not established a special exception for discrimination cases; it had

merely applied the established exception allowing the admission of matters where a party acts with unambiguous impropriety. Importantly it explained that unambiguous words of discrimination would fall into this exception and thus not be protected by the without prejudice rule.

The EAT further held that the fact the statement came into the public domain did not in of itself mean that it was not protected by the without prejudice rule.

To content *Miriam Shalom*

DDA excludes discrimination based on perceived disability

Aitken v Metropolitan Police UKEAT/0226/09/ZT

Mr Aitken was a policeman employed by the Metropolitan Police. He behaved aggressively and inappropriately at a social event. He had been diagnosed as having OCD and a tendency to binge drink. Mr Aitken alleged that the Respondent had, in relation to Mr Aitken's retirement on medical grounds, directly discriminated against him on the basis of a (falsely) perceived disability: dangerous mental illness.

The principal ground of appeal was that the ET erred in law by excluding discrimination contrary to Sections 3A(1) and 3A(5) read together with Section 4 of the DDA as amended on grounds of *perceived* disability.

The EAT observed that the ET had rejected Mr Aitken's contention that the reason for the treatment by the Respondent of which he had complained was a perception that he had a dangerous mental illness. Therefore the argument that treatment on the grounds of a perception of mental illness is for a reason relating to or on grounds of disability was academic.

Nonetheless the EAT reviewed the current case law on perceived disability, and reiterated that the conduct of which complaint is made under DDA must be for a reason relating to or on grounds of *actual* and not perceived disability. The EAT referred to ***Coleman v Attridge Law*** [2008] ICR 1128, *EBR* ***Attridge LLP v Coleman*** [2010] ICR 242 and *English v Thomas Sanderson Blinds Ltd* [2009] IRLR 206.

It may well be, however, that this is a short-lived decision that does not outlast the implementation of the Equality Act.

To content *Steven Fuller*

A job swap may constitute a reasonable adjustment under the DDA

Chief Constable of South Yorkshire Police v Jelic (29 April 2010) (UKEAT/0491/09/CEA)

This case concerns a police officer with chronic anxiety syndrome, as a result of which he could not work in front line services. He had been given a job which did not involve direct face-to-face contact with the public and was able to perform that role. Due to a reorganisation, that role changed to include face-to-face contact elements. The police force decided to medically retire PC Jelic.

PC Jelic brought claims on numerous DDA grounds, including failure to make reasonable adjustments. One adjustment suggested was that PC Jelic should swap roles with a PC Franklin, who was in a post that would fit within PC Jelic's capabilities as affected by his disability.

The ET found that the job swap would have been a reasonable adjustment. On appeal the EAT upheld the ET decision on this point. The EAT found that the examples of reasonable adjustments provided by s.18B(2) of the DDA was non-exhaustive. Further, there was no blanket ban on the creation of a different post for an employee with a disability. This was a matter to be considered objectively on a case-by-case basis. This lack of a blanket ban extended to the possibility of a job swap being a reasonable adjustment.

Relevant considerations in a particular case might be whether the potential swapper was suited to the role held by the disabled employee; whether the roles are of equal status; and the views of the potential swapper about the possibility of swapping.

To content *Jason Braier*

Guidance on how detailed 'reasonable investigation' may have to be

Salford NHS Trust v Roldan [2010] EWCA Civ 522

Ms Roldan was a Filipino nurse (the relevance of the Claimant's nationality is of some importance in this case). In 2007 a colleague, complained that Ms Roldan had ill-treated a patient and Ms Roldan was suspended as a result. An investigation was conducted by an assistant director for the employer, as a result of which the matter proceed to a disciplinary hearing. Prior to the disciplinary hearing Ms Roldan received a copy of a statement, which made reference to a number of incidents, such as tapping the patient's foot with increasing force and showing him the 'V' sign. In the statement it was also alleged that while these incidents were taking place Ms Roldan tried to ensure that she was observed.

The employer found that the allegations were proved and Ms Roldan was dismissed for gross misconduct. As a result of the dismissal Ms Roldan not only lost her work permit and the right to remain in the United Kingdom, but was subjected to a criminal investigation by the police. There was then an unsuccessful internal appeal which amounted to a rehearing.

A claim was then brought and the Tribunal found that Ms Roldan had been unfairly dismissed and cited ***A v B*** [2003] IRLR 405. The Employer appealed to the EAT which found the Tribunal's criticisms unjust and its decision perverse**.**

The Court of Appeal allowed an appeal from the EAT. Elias LJ gave much-needed guidance on the extent of investigation necessary to constitute reasonable investigation in a conduct matter.

The Court of Appeal also endorsed and developed the principle set down in ***A v B*** that where the employee faces potential criminal charges, the employer must conduct the most careful investigation.

In ***Salford*** the Court of Appeal took the view that if dismissal could seriously damage an employee's career to any significant degree, tribunals may be required to consider the employer's procedures all the more carefully.

Elias LJ also commented on the approach that employers should take to allegations of misconduct where there is a conflict in the evidence (as there was in this case). His Lordship said that, although employers must have a genuine belief bases on reasonable grounds that the misconduct has occurred, they are not obliged to believe one employee over another. On occasions it may be appropriate for employers to say that they cannot resolve the conflict and therefore do not find the case proved against the accused employee, without coming down in favour of one side or the other.

To content *Sami Rahman*

Defining the ambit of "contract worker" under anti-discrimination legislation

Leeds City Council v Woodhouse [2010] EWCA Civ 410

This case concerned the ambit of the "contract worker" jurisdictional clause of anti-discrimination legislation – section 7 of the Race Relations Act 1976 in this case.

Mr Woodhouse worked as a Principal Regeneration Officer for an arms length management organisation ("ALMO") through whom some of Leeds' property management functions were carried out. Amongst Mr Woodhouse's duties was oversight of some of the work of the property division's employees and brought a claim against Leeds City Council in respect of his treatment. As a

preliminary issue, the question arose whether Mr Woodhouse was a contract worker so that the Tribunal had jurisdiction to hear his claim. In holding Mr Woodhouse fell within the definition. The Court of Appeal followed the line of cases which prefer giving "contract worker" a broad definition in order to ensure the effect of anti-discrimination is not undermined. The Court of Appeal followed the two-question approach of ***Harrods Ltd v Remick*** [1998] ICR 156, namely (1) whether the work done by the individual was done for the Respondent; and (2) whether the Claimant was a person who his direct employer supplied to the principal under a contract.

Lady Justice Smith found that everything done by Mr Woodhouse was done not only for the ALMO but also for the council, so that the first question was argued in the affirmative. As to the second question, her Ladyship found it satisfied because the ALMO was obliged by the council to employ employees to carry out its contractual obligations to the council.

There are two new points of interest in Smith LJ's judgment. First, she emphasised control and influence by the principal is not essential to a finding that the Claimant is a contract worker. Secondly, she strongly expressed the view that the question of whether a Claimant is a contract worker is of sufficient complexity that it is best considered as part of the trial rather than as a preliminary issue.

To content *Jason Braier*

LEGISLATIVE UPDATES

At long last the default retirement age is to be phased out

The Government has finally announced details of how it will remove the default retirement age of 65 permitted by the Employment Equality (Age) Regulations 2006.

The proposal is that the default state retirement age of 65 will be phased out from April 2011. The proposal is subject to consultation, which will run until 21 October 2010.

The aspects of the proposals that are of interest are:

- that retirements under the default retirement age will phased out completely on 1 October 2011 and no new notices of intended retirement may be issued after 6 April 2011;

- that retirement dismissals will still be permissible after 1 October, but only if objectively justified;

- the creation of the almost obligatory transitional arrangements, which will apply to retirements that have been notified before 6 April 2011 to take effect before 1 October 2011. Retirements notified before 6 April, but intended to take effect after 1 October, will not be valid (unless objectively justified);

- the procedural requirements applicable to a retirement dismissal, currently set out in Schedule 6 to the Age Regulations, will be abolished.

To content *Sami Rahman*